RECORD AND BRIEFS

17 571

No. __-____

IN THE
Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,

v.

WALL-STREET.COM, LLC AND JERROLD D. BURDEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 13, 2017

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QUESTION PRESENTED

Section 411(a) of the Copyright Act provides (with qualifications) that "no civil action for infringement of [a] copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). The question presented is:

Whether "registration of [a] copyright claim has been made" within the meaning of § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the Fifth and Ninth Circuits have held, or only once the Copyright Office acts on that application, as the Tenth Circuit and, in the decision below, the Eleventh Circuit have held.

PARTIES TO THE PROCEEDINGS

Petitioner Fourth Estate Public Benefit Corporation was the plaintiff and the appellant in the proceedings below.

Respondents Wall-Street.com, LLC and Jerrold D. Burden were the defendants and the appellees in the proceedings below.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Fourth Estate Public Benefit Corporation states that it is a public benefit corporation that has not issued any stock.

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The Fourth Estate Public Benefit Corporation respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 856 F.3d 1338. The order of the district court granting respondents' motion to dismiss (App. 11a-14a) is not reported (but is available at 2016 WL 9045625).

JURISDICTION

The court of appeals entered its judgment on May 18, 2017. On August 7, 2017, Justice Thomas extended the time for filing a certiorari petition to and including October 13, 2017. App. 36a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act (17 U.S.C.) are reproduced at App. 23a-35a.

INTRODUCTION

The Eleventh Circuit's decision deepens division among the circuits about a question that arises at the start of most copyright infringement cases: whether the copyright holder registered the work with the Copyright Office before suing for infringement, as § 411(a) of the Copyright Act requires. The Fifth Circuit and the Ninth Circuit have held that, if a copyright holder files an application, deposits a copy of the work, and pays the required fee, as required by § 408(a) of the Copyright Act, the copyright holder has "made" the required "registration" within the meaning of § 411(a) – whether or not the Register of Copyrights has acted on that application. In the decision below, the Eleventh Circuit rejected that

view, joining the Tenth Circuit in holding that a copyright owner may not sue infringers until after the Copyright Office has acted on the application and registered (or refused to register) the copyright claim.

The Court should grant the petition. The question presented not only recurs repeatedly in copyright infringement cases but also frequently leads to wasteful litigation; worse, the interpretation adopted by the Eleventh Circuit can deprive the owner of a valid copyright of statutory remedies for infringement. Courts, including several courts of appeals, and scholars have addressed the question and reached opposing views, and there is no prospect that further litigation will resolve the conflict among the circuits. The judgment below turns wholly on the answer to the question, making this case an appropriate vehicle for this Court to resolve it.

Further, the Eleventh Circuit's decision is incorrect. The Copyright Act uses the phrase "registration . . . has been made" to refer to the action of the copyright holder in following the required procedures for registration of a copyright claim. The court of appeals misread the statute by focusing solely on the word "registration" – which by itself can refer to the action of the copyright holder or the Copyright Office – rather than reading the word in context. Moreover, the correct statutory reading leads to a far more sensible result, because the rule adopted in the decision under review leads to pointless delay and may prejudice the rights of copyright owners despite their compliance with the statute's requirements.

STATEMENT

A. Statutory Background

1. The Copyright Act protects "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 102(a). As soon as a work is created, the copyright owner holds exclusive rights "to do and to authorize" others to do certain things with the work. *Id.* § 106. Accordingly, unlike useful inventions – which are protected by exclusive rights only after a patent application has been reviewed and approved by the Patent and Trademark Office ("PTO") and a patent issued – original works of authorship are protected by virtue of their creation, not an affirmative government grant.

The Copyright Act also contains provisions for registration of copyrights – even though "[s]uch registration is not a condition of copyright protection." 17 U.S.C. § 408(a). The copyright owner "may obtain registration of the copyright claim" by depositing a copy (or, in the case of published works, two copies) of the work, along with "the prescribed application and fee" with the Copyright Office. *Id.* § 408(a), (b); *see also id.* § 409 (describing required elements of the application). The Register of Copyrights is required to conduct an examination, and, if the Register determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," the Register "shall register" the claim and issue a "certificate of registration." *Id.* § 410(a). The statute provides that the "effective date of a copyright registration" is not the date of issuance of the certificate but is instead "the day on which an application,

deposit, and fee, which are later determined . . . to be acceptable for registration, have all been received in the Copyright Office." *Id.* § 410(d).

If, on the other hand, the Register determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason," the Register "shall refuse registration" and notify the applicant of the reasons for refusal. *Id.* § 410(b).[1]

Relatively few works are registered each year, and only a small number of applications are refused for any reason.[2] In 2016, according to Copyright Office statistics, the Register received a little more than half a million claims and processed approximately 470,000. It refused registration on 12,656 claims, or less than 3%.[3] It is not clear what percentage of those rejections involved questions of copyrightable subject matter, but the very small number of requests for administrative review following a rejection – in Fiscal 2016, only 320 such requests involving 436 claims were made – may indicate that many rejections

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[1] Copyright Office regulations provide for internal administrative review of an examiner's decision to refuse registration – a procedure referred to as "reconsideration." *See* 37 C.F.R. § 202.5. The statute does not have any specific provision for judicial review of a refusal decision, and a copyright owner need not obtain such review to sue for infringement.

[2] The number of potentially copyrightable works created each year is practically limitless: a child's thank-you note to her aunt would likely qualify. Unless the author anticipates enforcing her statutory rights, there is little reason to register.

[3] *See* U.S. Copyright Office, *Fiscal 2016 Annual Report* 9, *available at* https://www.copyright.gov/reports/annual/2016/ar2016.pdf.

are for "legal or procedural reasons" other than copyrightability.[4]

2. "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright." 17 U.S.C. § 501(a). The copyright owner "is entitled . . . to institute an action for . . . infringement." *Id.* § 501(b). A federal court with jurisdiction over an infringement action may grant a temporary or permanent injunction, *see id.* § 502; an infringer is also liable for either "the copyright owner's actual damages and any additional profits of the infringer" or "statutory damages," *id.* § 504(a). The copyright owner must file that suit "within three years after the claim accrued." *Id.* § 507(b); *see generally Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).[5]

Before bringing such an action, owners of a copyright in a United States (but not foreign) work must "register their works." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010). Specifically, § 411(a) of the Copyright Act provides that "no civil action for infringement of [a] copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). The right to proceed with litigation does not depend on whether the registration is granted, though a certificate of registration obtained before or promptly after publication

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[4] *Id.*; *see id.* (noting that 2016 ended with "more than 316,000 claims on hand in the system, nearly 29,000 of which required more information from applicants").

[5] The courts of appeals have uniformly held that an infringement claim accrues on the date the copyright owner knew, or should have known, of the infringement. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (collecting cases).

confers certain litigation advantages. In particular, if a plaintiff has a certificate of a registration "made before or within five years after first publication of the work," the certificate "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate"; the "evidentiary weight to be accorded" a certificate granted thereafter is left to the court's discretion. *Id.* § 410(c).

In a case where registration has been refused, however, the applicant is nevertheless "entitled to institute a civil action for infringement." *Id.* § 411(a). In such a case, the plaintiff is required to serve a copy of the complaint on the Copyright Office, and the Register may intervene "with respect to the issue of registrability of the copyright claim." *Id.* But the litigation may proceed irrespective of the Register's participation. *See id.*

B. Factual Background

Fourth Estate "is an independent news organization" whose journalists produce "high quality, timely, accurate and compelling journalism." App. 15a-16a (Compl. ¶¶ 1-2). Fourth Estate owns the copyrights in those journalists' works and licenses them to a cloud-based news organization called AHN Feed Syndicate; AHN Feed Syndicate, in turn, licenses them to others. App. 16a, 18a (*id.* ¶¶ 2, 4, 14-15). Fourth Estate retains the right to sue for copyright infringement. App. 16a (*id.* ¶ 2).

This case concerns one of AHN Feed Syndicate's former licensees, Wall-Street.com, LLC ("Wall-Street"). Wall-Street secured a license to put some of Fourth Estate's works on the Internet. App. 18a (*id.* ¶ 17). Under that license, if Wall-Street canceled its account with AHN Feed Syndicate, Wall-Street was to "stop display of all Feed Syndicate provided content and permanently take down, remove and/or

delete all cached, saved, archived, stored or data-based content or data." *Id.* (*id.* ¶ 18). Wall-Street canceled its account but continued to copy and distribute 244 of Fourth Estate's works. App. 18a-19a (*id.* ¶¶ 15, 19); *see* Compl. Ex. 1, ECF 1-2.

In March 2016, Fourth Estate sued Wall-Street, seeking an injunction and damages. App. 21a-22a (Compl. at 7). Before it did so, it filed its application for registration with the Copyright Office; it did not wait for the Office to act on that application. App. 18a (*id.* ¶ 14). Nineteen months later – more than half the length of the Copyright Act's statute of limitations – that application remains pending.

C. Proceedings Below

Wall-Street moved to dismiss, arguing that § 411(a) bars Fourth Estate from suing until after the Register of Copyrights acts on its application. The district court granted the motion. App. 13a.

Recognizing that this case "require[d] [it] to decide an issue that has divided the circuits," App. 1a, the Eleventh Circuit held that the text of the Copyright Act required dismissal – aligning itself with the Tenth Circuit and expressly rejecting the contrary view of the Fifth Circuit and the Ninth Circuit. App. 4a-6a. The court stated that the Act "defines registration as a process that requires action by both the copyright owner and the Copyright Office." App. 6a. The copyright owner files an application, deposits a copy, and pays the required fee; the Register "then examines the material" and determines whether it is registrable. *Id.* The court held that the use of the phrase "after examination" in § 410(a) – which describes the procedure that the Register must follow in registering a claim – "makes explicit that an application alone is insufficient for registration." *Id.* Furthermore, § 410(b) authorizes the Register

to "refuse registration"; the court believed that, if "registration occurred as soon as an application was filed, then the Register of Copyrights would have no power to 'refuse registration.'" App. 7a (quoting 17 U.S.C. § 410(b)).

The court rejected Fourth Estate's contrary arguments based on other provisions of the statute. The court read § 408(a) – which states that a copyright owner "may obtain registration of the copyright claim by delivering" the required materials to the Register, 17 U.S.C. § 408(a) – to say nothing about when registration occurs, but only about "the conditions a copyright owner must satisfy to obtain registration." App. 7a. It likewise found it insignificant that § 410(d) provides that the effective date of registration is the date the application is complete, rather than the date the Copyright Office acts on an application. In the court's view, that section supports its rule because "registration occurs only after the Register of Copyrights deems an application 'to be acceptable.'" App. 8a (quoting 17 U.S.C. § 410(d)).

The court also acknowledged the harsh result that its rule, together with the statute of limitations, can bring about: "an owner who files an application late in the statute of limitations period risks losing the right to enforce his copyright in an infringement action because of the time needed to review an application." *Id.* "But," in the court's view, "this potential loss encourages an owner to register his copyright soon after he obtains the copyright and before infringement occurs." *Id.* The court also refused to consider the Copyright Act's legislative history and animating policy, instead finding the language that other courts of appeals had interpreted differently to be "unambiguous." App. 9a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision deepens an acknowledged circuit split about the meaning of the statutory phrase "registration . . . has been made" in § 411(a). In the Fifth and Ninth Circuits, a copyright owner may sue to enforce exclusive rights once the materials required for registration have been submitted to the Copyright Office. But, in the Tenth and Eleventh Circuits, a copyright owner has no remedy for infringement until after the Copyright Office has acted on the application.

That conflict, on a matter of great practical significance, will not be resolved without this Court's review. Furthermore, the rule adopted by the court below and previously by the Tenth Circuit misreads the statutory language, by (incorrectly) construing the word "registration" in isolation and failing to construe the operative phrase, "registration . . . has been made" – phrasing the statute uses repeatedly to refer to the actions of the copyright holder. The court's decision in this case invites wasteful litigation and jeopardizes copyright owners' ability to enforce their statutory rights. This case provides an ideal opportunity to resolve the issue correctly once and for all.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS ON A MATTER OF SIGNIFICANT PRACTICAL IMPORTANCE

A. The Courts Of Appeals Are Divided On The Question Presented And Will Remain So Absent This Court's Review

Four courts of appeals have resolved the question presented, dividing evenly on the issue.

1. The Ninth Circuit and the Fifth Circuit have held that "receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a)." *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010); *see Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated in part on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 n.2 (2010); *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984).

a. In *Cosmetic Ideas*, after noting that the circuits were already divided on the issue, the Ninth Circuit determined that § 411(a) itself "gives no guidance in interpreting the meaning of 'registration,'" which is "unhelpfully" defined elsewhere in the statute as "'a registration of a claim in the original or the renewed and extended term of copyright.'" 606 F.3d at 616 (quoting 17 U.S.C. § 101). The court found the "language of the statute as a whole" likewise to be ambiguous. *Id.* at 616-17.

Because the court found the statutory language to be ambiguous, it sought to "discern its meaning by looking to 'the broader context of the statute as a whole' and the purpose of the statute." *Id.* at 618. The court concluded that allowing a copyright holder to sue once it had submitted its complete application "better fulfills" the purpose of the statute. *Id.* at 619. The court noted that this approach "avoids unnecessary delay . . . , which could permit an infringing party to continue to profit from its wrongful acts." *Id.* The court emphasized that § 411(a) "allows a party, after applying for registration, to litigate the claim whether the Copyright Office accepts or rejects the registration." *Id.* Requiring a copyright holder to

wait until the Copyright Office has acted "'create[s] a period of "legal limbo" in which suit is barred.'" *Id.* at 620 (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][1][a][i] (2008)). At the same time, allowing a copyright owner to sue while the application is pending does not "impair[] the central goal of copyright registration" because the copyright holder is nevertheless obligated "to submit the information necessary to add the copyright to the federal registry." *Id.*

The court also found that the "requirement of affirmative approval or rejection before suit . . . amounts to little more than just the type of needless formality Congress generally worked to eliminate in the 1976 Act." *Id.* And, "in addition to being general inefficient, in the worst-case scenario the registration approach could cause a party to lose its ability to sue," given the three-year statute of limitations. *Id.* "This result does not square well with § 410(d)'s mandate that an application's effective registration date should be the day that a completed application is received." *Id.*

The court also rejected the argument that "deference to the Register" required a different result. *Id.* at 621. First, as a practical matter, because of the pace of litigation, the Copyright Office will typically have acted before a case is decided, and the Copyright Office, if it rejects an application, will still have an opportunity to intervene in the pending litigation. *See id.* Moreover, "the Register's decision of whether or not to grant a registration certificate is largely perfunctory, and is ultimately reviewable by the courts." *Id.* Thus, review by the Copyright Office and underlying litigation "can occur simultaneously with little or no prejudice to any involved parties." *Id.*

b. The result in *Cosmetic Ideas* accords with the result earlier reached and repeatedly reaffirmed by the Fifth Circuit, which, as the first court of appeals to address the issue, held that, "to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application." *Apple Barrel*, 730 F.2d at 386-87; *see also Lakedreams*, 932 F.2d at 1108 (5th Cir. 1991); *accord Positive Black Talk*, 394 F.3d at 365.

To support that conclusion, the Fifth Circuit relied on Professor Nimmer's analysis. *See Apple Barrel*, 730 F.2d at 386-87. His treatise concludes that this "approach to registration better comports with the statutory structure" than the one adopted below. 2 *Nimmer on Copyright* § 7.16[B][3][b][ii] (2013). Section 411(a) "requires only that '*registration* of the copyright claim has been made *in accordance with [Title 17]*,'" and Title 17 "elsewhere specifies that the 'effective date of a copyright registration is'" backdated to the day the completed application is received in the Copyright Office. *Id.* (quoting 17 U.S.C. §§ 410(d), 411(a)) (emphases in *Nimmer*). "Given that the claimant who has submitted an application that has yet to be acted upon at that juncture has done all that she can do, and will ultimately be allowed to proceed regardless of how the Copyright Office treats her application, it makes little sense," in Professor Nimmer's view, "to create a period of 'legal limbo' in which suit is barred." *Id.* (footnote omitted). Further, that rule promotes both judicial efficiency and copyright owners' substantive rights – "considerations" that "become especially *apropos* when one

reflects that the Copyright Office typically registers about 99 percent of the claims submitted to it." *Id.*[6]

2. By contrast, the Tenth Circuit, like the Eleventh Circuit, has held that "[t]he plain language of the statute" requires a copyright owner to await the Copyright Office's action before he may sue. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005). The Tenth Circuit was of the view that "[n]o language in the Act suggests that registration is accomplished by mere receipt of copyrightable material by the Copyright Office." *Id.* at 1200. Until the Register affirmatively determines that copyright protection is warranted, the court held, "registration" is not "'made'" within the meaning of § 411(a). *Id.* at 1200-01. The court found this reading to be bolstered by § 410(a) – which requires the Register to "register [a] claim" only "after examination" – and by § 410(b) – which allows the Register to "refuse registration." *See id.*

The court noted the contrary view of the Fifth Circuit, and acknowledged that it "has some appeal." *Id.* at 1204 (noting that "it is odd that one can possess a copyright but be unable to file suit until it is 'voluntarily' registered"). Whatever the "practical force" of the contrary approach, the court stated that there were "three reasons" to reject it. *Id.* First, the court suggested that the statute does not "convey certain remedies and benefits upon application and other remedies and benefits upon registration." *Id.* Rather, the "remedies are part of a single package." *Id.* Second, the court found it "not illogical" for Congress to induce registration by withholding remedies until after "registration is accomplished." *Id.* at 1204-05.

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[6] For what it is worth, Patry disagrees (strenuously). *See* 5 William F. Patry, *Patry on Copyright* § 17:78 (2012).

Third, the court found that a contrary approach would "allow[] for shifting legal entitlements," *id.* at 1205, though it did not attempt to square this observation with § 410(d), which makes the effective date of registration retroactive to the date that the copyright owner submits the required materials to the Copyright Office.

3. This split among the circuits is entrenched and is unlikely to be resolved without action by this Court. Both the First Circuit and the Second Circuit have recognized the split without finding occasion to address it. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014); *Alicea v. Machete Music*, 744 F.3d 773, 779 & n.7 (1st Cir. 2014). The Seventh Circuit has issued contradictory dicta without squarely resolving the question. *See Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806 (7th Cir. 2009) (per curiam).[7] And district courts within the Second,[8] Third,[9] Fourth,[10] and

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[7] *Compare Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (Registration "is a prerequisite to a suit to enforce a copyright. More precisely, an application to register must be filed, and either granted or refused, before suit can be brought."), *with Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (supporting the contrary approach).

[8] *Compare Gattoni v. Tibi, LLC*, No. 16 Civ. 7527 (RWS), 2017 WL 2313882, at *3 (S.D.N.Y. May 25, 2017), *with Chevrestt v. American Media, Inc.*, 204 F. Supp. 3d 629, 631 (S.D.N.Y. 2016).

[9] *Compare North Jersey Media Grp. Inc. v. Sasson*, Civ. No. 2:12-3568 (WJM), 2013 WL 74237, at *2 (D.N.J. Jan. 4, 2013), *with K-Beech, Inc. v. Doe*, Civil Action No. 11-7083, 2012 WL 262722, at *2-3 (E.D. Pa. Jan. 30, 2012).

[10] *Compare Caner v. Autry*, 16 F. Supp. 3d 689, 706-08 (W.D. Va. 2014), *with Mays & Assocs. Inc. v. Euler*, 370 F. Supp. 2d 362, 368-70 (D. Md. 2005).

D.C.[11] Circuits have recognized the split, reaching different conclusions.

The government and the Copyright Office in particular have likewise made their view known. In *Reed Elsevier*, the government acknowledged the split and endorsed *La Resolana Architects*' analysis. *See* Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 24 n.14, *Reed Elsevier*, No. 08-103 (U.S. filed June 8, 2009) ("U.S. *Reed Elsevier* Br."), https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0103.mer.ami.pdf; *see also* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 625.5, at 217 (3d ed. 2017) ("*Copyright Office Compendium*") (acknowledging the split and stating that, "[i]n the Office's view, . . . filing a lawsuit based solely on the submission of an application for registration does not satisfy" the statutory requirement), https://www.copyright.gov/comp3/docs/compendium.pdf. The government has argued that, "if the district court were to adjudicate an infringement suit on the merits while the plaintiff's application was pending before the Copyright Office, the court would be deprived of the Register's views on such issues as copyrightability." U.S. *Reed Elsevier* Br. 25 n.14.

B. The Question Presented Is Important

The question presented is of significant practical importance. Whether the plaintiff has satisfied the registration requirement of § 411(a) may arise at the outset of any infringement case involving a non-exempt U.S. work. In cases where infringement

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[11] *Compare Prunte v. Universal Music Grp.*, 484 F. Supp. 2d 32, 40 (D.D.C. 2007), *with Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3 (D.D.C. 2002).

is ongoing and an application for registration is complete but not yet acted on, an infringer can, at a minimum, delay proceedings on the merits and impose additional costs on the copyright owner while the question of compliance with § 411(a) is resolved. (That is what occurred here.) This is especially true in those eight regional circuits where the question has not yet been resolved by the court of appeals.

Even worse, in cases where a combination of delay in registration and delay by the Copyright Office leads to expiration of the statute of limitations before the Copyright Office acts, a copyright owner may lose a remedy altogether. And that is so even though the copyright exists from the time the work is first created, and registration, if granted, is retroactive to the date of application, and even though, if registration is denied, the copyright owner is nevertheless entitled to sue.

It is true that the Copyright Office has created a process for parties to request expedited "special handling" by filing additional paperwork and paying an additional $800 per work claimed. *Copyright Office Compendium* § 623, at 199. But that is many times the standard registration fee, and it can amount to a prohibitive sum when alleged infringement involves a number of separately registered works (for example, recordings by various artists on the same independent record label). In any event, the Copyright Act precludes the Office from exacting a significant surcharge simply to ensure that copyright owners can enforce their statutory rights.

C. This Case Provides An Appropriate Vehicle For Resolution Of The Question Presented

This case is the ideal vehicle in which to resolve the statutory issue presented. The question was squarely raised below, and the Eleventh Circuit's answer forms the sole basis for its judgment. App. 1a-2a. No better vehicle will emerge.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE COPYRIGHT ACT

The Eleventh Circuit's decision is incorrect. The court focused on the word "registration" and concluded that the term must refer to the registration, memorialized by a certificate, that is granted by the Register after examination. But "registration" is not so defined in the statute. *Cf.* 17 U.S.C. § 101 (providing a circular definition of "registration" to mean "registration of a claim in the original or the renewed and extended term of copyright"). And the term "registration" is used in the statute in its ordinary sense to refer to both the action of the Copyright Office – that is, registration that the Office grants – and the action of a copyright owner, who registers a claim by following the required statutory procedures.

If the court had instead looked at the word in the context of the phrase it was construing – "registration . . . has been made" – the court would have found much more guidance in the statutory language, including both its immediate context and the use of the phrase elsewhere in the statute. Using these tools of statutory construction, it becomes clear that "registration has been made" for purposes of § 411(a) once a copyright holder submits the materials required for registration. Furthermore, that construction is

both more sensible and more consistent with the basic policies of the Copyright Act.

A. A Careful Reading Of The Statute's Text Establishes That The Eleventh Circuit's Construction Is Incorrect

Careful attention to the text makes clear that "registration . . . has been made" refers to the action of the copyright holder.

1. Start with the language of § 411(a) itself. That provision states, subject to a specified exception and the provisions of § 411(b), that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). Yet the statute goes on to state that, "[i]n any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement," provided that the copyright owner gives notice to the Copyright Office. *Id.* The fact that a copyright holder is permitted to "institute a civil action" even though the Copyright Office refuses the application means that "registration . . . has been made" is most logically read to refer to the action of the copyright holder – that is, applying for registration – and not the action of the Copyright Office. Otherwise, the two sentences would contradict each other – that is, the second sentence would mean that a suit for infringement may be instituted even though registration had *not* been made. Statutes should be read to avoid, not create, such contradictions. *See Liteky v. United States*, 510 U.S. 540, 552

(1994) (rejecting reading that would cause statute "to contradict itself").

The use of the word "however" does not resolve the contradiction created by the Eleventh Circuit's reading of the statute – the word signals contrast or qualification, not literal contradiction. *See Webster's New International Dictionary* 1209 (2d ed. 1950) (defining "however" as "[n]evertheless; notwithstanding; yet; still"). The "however" signals that, if the Copyright Office refuses registration, an additional requirement is imposed – notice to the Office. It cannot reasonably be read to state that a civil action may be instituted even though registration has not been made at all. Put another way, cases where "the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused" constitute a subset of those cases where "registration . . . has been made" that are subject to an additional procedural requirement.

The conclusion that the phrase "registration . . . has been made" refers to the action of the copyright holder is confirmed by the language of § 411(c). That provision, which applies to works consisting of "sounds, images, or both, the first fixation of which is made simultaneously with transmission," allows a copyright owner to institute an action for infringement if (among other requirements) "the copyright owner . . . makes registration for the work, if required by subsection (a), within three months after its first transmission." 17 U.S.C. § 411(c). This provision confirms, first of all, that "registration" can indeed refer to the action of the copyright owner in applying for registration. Moreover, the construction "copyright owner . . . makes registration" parallels the

passive-voice construction "registration . . . has been made," confirming that, while the Copyright Office "register[s] [a] claim," *id.* § 410(a), the copyright owner "makes registration."[12]

2. The use of similar constructions elsewhere in the statute reinforces the conclusion that "registration . . . has been made" refers to the action of the copyright owner. For example, § 408(c)(3) provides that "a single renewal registration *may be made* for a group of works by the same individual author . . . *upon the filing of a single application and fee*." 17 U.S.C. § 408(c)(3) (emphases added). This provision naturally is read to refer to the action of the copyright holder, as the only action required for such "registration" is the filing of the application and fee – not any action by the Copyright Office. *See also id.* § 408(e) (providing that "[r]egistration for the first published edition of a work previously registered in unpublished form *may be made*") (emphasis added).

Likewise, in § 412, the statute uses the phrase "registration is made" with clear reference to the action of the copyright holder. *Id.* § 412(2). That provision deals with limitations on certain remedies

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[12] The legislative history of the Copyright Act of 1976 likewise refers to the owner registering his claim – not the Copyright Office. *See* H.R. Rep. No. 94-1476, at 157 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5773 (Comm. on the Judiciary) ("[A] copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration."); *id.* at 152, 1976 U.S.C.C.A.N. 5768 ("Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by 'the owner of copyright or of any exclusive right in the work' at any time during the copyright term."). This is consistent with the statutory construction that petitioner urges here.

in actions for infringement of a copyright of a work that has been preregistered under § 408(f); § 412 specifies that "no award of statutory damages or attorney's fees . . . shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, *unless such registration is made* within three months after the first publication of the work." *Id.* (emphasis added). It would make no sense for the three-month deadline to apply to action by the Copyright Office; rather, as with § 411(c), this provision requires *copyright owners* to make registration within three months (even though the Copyright Office may act later).

3. The Eleventh Circuit correctly noted that "registration" is also used in the statute to refer to the action of the Copyright Office – for example, § 410(a) directs the Register to "register" a claim when legal and formal requirements have been met, and § 410(b) directs the Register to "refuse registration" when such requirements are not met. But the observation that registration *can* refer to the action of the Copyright Office does not mean that it *cannot* refer, in appropriate context, to the action of the copyright holder in applying for registration. *See Barber v. Thomas*, 560 U.S. 474, 484 (2010). On the contrary, as explained above, the statute uses the term repeatedly in this sense.

As a matter of ordinary language, there is nothing paradoxical about this, because the word "registration" has substantial flexibility built in. A college student may register for classes (and thus complete registration) yet not get into a particular course (and thus be denied registration). Given the absence of any limiting definition of "registration" and the

diverse use of the word in the Copyright Act, the Eleventh Circuit's analysis does not hold up.

At the same time, the statute never uses the construction "make registration" or its passive-voice counterpart to refer specifically to the action of the Copyright Office. That phraseology is, however, repeatedly used to connote action by the copyright holder – and that is how it is used in § 411(a).

B. The Eleventh Circuit's Interpretation Is Inconsistent With The Copyright Act's Scheme Of Rights and Remedies

The statutory language resolves the question presented; furthermore, that reading avoids the inefficiency and inconsistency that the interpretation adopted by the court below invites. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (noting that "[a] court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (citation omitted); *see also* 2 *Nimmer on Copyright* § 7.16[B][3][b][ii] ("Indeed, some courts that follow the [Eleventh Circuit's] approach concede that it yields an inefficient and peculiar result.").

1. Making the Copyright Office the gatekeeper to enforcement of copyrights is inconsistent with the rest of the Copyright Act, which makes clear that a copyright owner's rights do not depend on any affirmative government grant. The Act grants a copyright owner exclusive rights in a work as soon as it is fixed in a tangible medium of expression. *See* 17 U.S.C. § 102(a). Those rights are not granted by the Copyright Office; they, instead, come about by virtue of the creation of the work. *See id.* § 408(a) ("[R]egistration is not a condition of copyright protection."); *see also* H.R. Rep. No. 94-1476, at 129, 1976

U.S.C.C.A.N. 5745 (protecting a work "as soon as it is 'created'").

To be sure, before a copyright owner can sue to enforce those rights, the copyright owner must register the claim with the Copyright Office. In this way, copyright owners that intend to seek judicial enforcement of their copyrights are given an incentive – indeed, they are required – to make use of the statutory system of registration. But once the copyright owner has made registration, that policy is fully vindicated. That is confirmed by the fact that registration *by the Register* is not a precondition to enforcement of copyright at all: on the contrary, if the Register refuses registration, the copyright owner may sue nevertheless.

Furthermore, none of the copyright owner's statutory remedies turns on the timing of action by the Copyright Office: the Copyright Act deems registration effective on the day a complete application for registration is received. *See* 17 U.S.C. § 410(d). That is so whether the determination that the requirements for registration are met is made by the Register or "by a court of competent jurisdiction." *Id.*[13]

Because neither the copyright holder's right to sue nor the copyright holder's remedies depend on the outcome of the examination by the Register, it makes

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[13] This is in marked contrast to the regime that governed under the Copyright Act of 1909. That statute had imposed "a dual system" that distinguished between registered, published works, which Congress protected by federal law, and unpublished works, which received their only copyright protection by the States. *See* H.R. Rep No. 94-1476, at 129, 1976 U.S.C.C.A.N. 5745. Congress abandoned that "anachronistic, uncertain, impractical, and highly complicated dual system" system in favor of a "single Federal system" that granted "statutory protection" to a work "as soon as it is 'created.'" *Id.*

little sense to place a copyright holder in months of "legal limbo" while the examination of a registration application is completed.

2. Nor is the Eleventh Circuit's reading required to allow courts to take advantage of the expertise of the Copyright Office on matters of copyrightability. At the outset, it is not the case, as the Eleventh Circuit thought, that allowing litigation to be instituted after the copyright holder has registered the claim (but before the Copyright Office has acted) would deprive the Register of "power to 'refuse registration.'" App. 7a. Whatever the status of any litigation commenced in federal court, the Register will be able to act in due course on the application submitted to the Copyright Office. Nor is it correct, as the Tenth Circuit thought, that "an applicant could obtain the advantage" of a presumption of validity "upon application" only to lose it if the Register denied the application. *La Resolana Architects*, 416 F.3d at 1205. The presumption of validity depends on a "*certificate* of a registration," not registration. 17 U.S.C. § 410(c) (emphasis added). Accordingly, if the Copyright Office has not registered the claim and issued a certificate of registration, the copyright holder will not gain any evidentiary advantage from having made registration. In any event, the statute has a degree of "shifting legal entitlements" built in, *La Resolana Architects*, 416 F.3d at 1205, because it makes the effective date of registration retroactive to the date of application.

It is likewise not the case (as the government has asserted in the past) that allowing litigation to proceed while registration is pending will deprive the Copyright Office of its right to intervene in litigation in cases where registration is refused: if an application were refused, notice would be required, and the

government could choose to intervene at that point. Absent unreasonable delay in examination, there is no risk that the government will lose its chance to participate at a meaningful time – and the possibility of such unreasonable delay is an argument in favor of petitioner's reading of the statute.

As noted, litigation may proceed irrespective of the view of the Copyright Office, and the determination of the Copyright Office constitutes "prima facie" evidence only in cases where it *grants* a certification of registration, 17 U.S.C. § 410(c).[14] As the leading treatise has pointed out, in most cases, even if litigation begins before the Copyright Office has granted or refused registration, such action can be expected during the course of litigation, giving the court the benefit of the Register's views. *See* 2 *Nimmer on Copyright* § 7.16[B][3][b][ii]. Just as important, in any case where a claim's eligibility for copyright protection presents a substantial issue, a court can make use of the ordinary tools of litigation management – including the doctrine of primary jurisdiction – to give the Copyright Office the first crack at determining whether the subject matter of the work is copyrightable. *Cf. Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (similar). Given the breadth of copyright law's protections, *see* 17 U.S.C. § 102(a), the Office typically grants the overwhelming majority of applications. *See* 2 *Nimmer on Copyright* § 7.16[B][3][b][ii]. There is no reason to believe that substantial issues of

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[14] By contrast, after the PTO has issued a patent, a litigant must present "clear and convincing" evidence to overcome the presumption that the patent is valid. *See generally Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011).

copyrightability will arise often – and no such defense has been asserted in this case.

3. By contrast, the Eleventh Circuit's approach creates significant practical problems, some of which the Ninth Circuit recognized in adopting the contrary rule. First, by barring a copyright owner from seeking the injunctive relief to which the Copyright Act entitles copyright owners until the Copyright Office acts, the rule requires the copyright owner to endure the ongoing theft of intellectual property rights the copyright owner already possesses – to the benefit of the infringer. *See Cosmetic Ideas*, 606 F.3d at 620. Second, if the Act's statute of limitations elapses before the Office acts on the application, the copyright owner may forever lose any ability to enforce the very same rights the Act grants. *See id.*

Third, the Eleventh Circuit's rule creates a procedural trap and invites pointless litigation. In many cases, the consequence of dismissal is simply to require refiling of a suit once the Copyright Office has acted. In such a situation, even if no remedy is lost, the copyright holder will necessarily incur the additional – and needless – expense of filing a duplicative complaint. That, in turn, imposes a corresponding administrative burden on the district courts. And, in the typical case where disputed issues involve the parties' conduct and not the validity of copyright, additional passage of time may risk blurring the evidence.

It is of course within the power of Congress to mandate such results, but the Copyright Act requires the opposite, and sensible, result here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13726

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Plaintiff-Appellant,

v.

WALL-STREET.COM, LLC, JERROLD D. BURBEN,
Defendants-Appellees.

[Filed May 18, 2017]

Before WILLIAM PRYOR, MARTIN, and BOGGS,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

"Registration" of a copyright is a precondition to filing suit for copyright infringement. 17 U.S.C. § 411(a). This appeal requires us to decide an issue that has divided the circuits: whether registration occurs when an owner files an application to register the copyright or when the Register of Copyrights registers the copyright. *Compare Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010) (concluding that registration occurs when the owner files an application), *with La Resolana*

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* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1197 (10th Cir. 2005) (concluding that registration occurs when the Register approves an application), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157, 130 S. Ct. 1237, 176 L.Ed.2d 18 (2010). Fourth Estate Public Benefit Corporation filed a suit for infringement against Wall-Street.com and Jerrold Burden. The complaint alleged that Fourth Estate had filed an application to register its allegedly infringed copyrights, but that the Copyright Office had not registered its claims. The district court dismissed the action because Fourth Estate failed to plead compliance with the registration requirement. 17 U.S.C. § 411(a). Because registration occurs when the Register of Copyrights "register[s] the claim," *id.* § 410(a), we affirm.

I. BACKGROUND

Fourth Estate Public Benefit Corporation is a news organization that produces online journalism. It licenses articles to websites but retains the copyright to the articles. Wall-Street.com, a news website, obtained licenses to a number of articles produced by Fourth Estate. The license agreement required Wall-Street to remove all of the content produced by Fourth Estate from its website before Wall-Street cancelled its account. But when Wall-Street cancelled its account, it continued to display the articles produced by Fourth Estate.

Fourth Estate filed a complaint for copyright infringement, 17 U.S.C. § 501, against Wall-Street and its owner, Jerrold Burden. The complaint alleged that Fourth Estate had filed "applications to register [the] articles with the Register of Copyrights." But the complaint did not allege that the Register of Copyrights had yet acted on the application.

Wall-Street and Burden moved to dismiss the complaint. They argued that the Copyright Act, *id.* § 411(a), permits a suit for copyright infringement only after the Register of Copyrights approves or denies an application to register a copyright. The district court agreed and dismissed the complaint without prejudice.

II. STANDARD OF REVIEW

"We review *de novo* the district court's grant of a motion to dismiss under [Federal Rule of Civil Procedure] 12(b)(6) for failure to state a claim, accepting the factual allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006) (emphasis added).

III. DISCUSSION

As a preliminary matter, the issue presented does not involve jurisdiction. Until 2010, our precedent held that registration was a jurisdictional prerequisite to filing an action for infringement. *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488 (11th Cir. 1990). But in *Reed Elsevier, Inc. v. Muchnick*, the Supreme Court held that the "registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." 559 U.S. 154, 157, 130 S. Ct. 1237, 176 L.Ed.2d 18 (2010).

Although registration is voluntary under the Copyright Act, Congress created several incentives for a copyright owner to register his copyright, *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012), one of which is the right to enforce a copyright in an infringement action:

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. § 411(a); *see also id.* § 408(f) (explaining that the Register "shall permit preregistration" for a limited class of works that have "a history of infringement prior to authorized commercial distribution"); 37 C.F.R. § 202.16(b)(1) (defining the limited class of works capable of preregistration to include material such as movies and sound recordings not at issue in this appeal). The question we must decide is when registration occurs.

The question when registration occurs has split the circuits. The Tenth Circuit follows the "registration" approach to section 411(a), which requires a copyright owner to plead that the Register of Copyrights has acted on the application—either by approving or denying it—before a copyright owner can file an infringement action. *La Resolana*, 416 F.3d at 1197-1203. In contrast, the Ninth and Fifth Circuits follow the "application" approach, which requires a copyright owner to plead that he has filed "the deposit, application, and fee required for registration," 17 U.S.C. § 411(a), before filing a suit for infringement. *Cosmetic Ideas*, 606 F.3d at 618-19; *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357,

365 (5th Cir. 2004), *abrogated in part by Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L.Ed.2d 18; *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984); *see also* Melville B. Nimmer, et al., 2 *Nimmer on Copyright* § 7.16 [B][3][b][v] (2016). The Eighth Circuit, in dicta, also endorsed the application approach. *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006). The caselaw of the Seventh Circuit contains conflicting dicta on whether it follows the application approach, *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) ("[A]n application for registration must be filed before the copyright can be sued upon."), or the registration approach, *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) ("[A]n application to register must be filed, and either granted or refused, before suit can be brought."), or whether it has even decided this question, *Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806 (7th Cir. 2009). And both the First and Second Circuits have acknowledged the circuit split but have declined to decide whether to adopt the application approach or the registration approach. *Alicea v. Machete Music*, 744 F.3d 773, 779 (1st Cir. 2014); *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014).

The parties dispute whether our precedents bind us to follow either approach. Wall-Street argues that our Circuit has adopted the registration approach and cites *M.G.B. Homes*, where we stated that a "lawsuit for copyright infringement cannot be filed unless plaintiff has a *registered* copyright." *M.G.B. Homes*, 903 F.2d at 1488 n.4 (quoting *Haan Crafts Corp. v. Craft Masters, Inc.*, 683 F. Supp. 1234, 1242 (N.D. Ind. 1988)); *see also Kernel Records*, 694 F.3d at 1302 n.8 (stating that "[w]e adopted the 'registra-

tion' approach in *M.G.B. Homes*."). Fourth Estate counters that we are not bound by *M.G.B. Homes* because *Muchnick* eroded the rationale for following the registration approach.

We need not decide this dispute about our precedents because the text of the Copyright Act makes clear that the registration approach that we endorsed in *M.G.B. Homes* and *Kernel Records* is correct. "[R]egistration of [a] copyright . . . has [not] been made in accordance with . . . title [17]," 17 U.S.C. § 411(a), until "the Register . . . register[s] the claim," *id.* § 410(a). Filing an application does not amount to registration.

The Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office. A copyright owner must first deposit a copy of the material with the Copyright Office, file an application, and pay a fee. *Id.* § 408(a). The Register of Copyrights then examines the material and determines whether "the material deposited constitutes copyrightable subject matter." *Id.* § 410(a). If the material is copyrightable "the Register shall register the claim and issue to the applicant a certificate of registration." *Id.* If "the material deposited does not constitute copyrightable subject matter . . . , the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal." *Id.* § 410(b).

The use of the phrase "after examination" in section 410(a) makes explicit that an application alone is insufficient for registration:

> When, *after examination*, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that

> the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

Id. § 410(a) (emphasis added). That registration occurs only *after* examination of an application necessarily means that registration occurs "[l]ater in time than" or "subsequent to" the filing of the application for registration. *After*, *Webster's New International Dictionary* 45 (2d ed. 1961).

Section 410(b) also establishes that registration can occur only after application and examination. That section states, "In any case in which the Register of Copyrights determines that . . . the material deposited does not constitute copyrightable subject matter . . . the Register shall refuse registration." 17 U.S.C. § 410(b). And section 411(a) allows a copyright holder who filed an application for registration to file an infringement suit if "registration has been refused." *Id.* § 411(a). If registration occurred as soon as an application was filed, then the Register of Copyrights would have no power to "refuse registration." *Id.* § 410(b).

Fourth Estate argues that section 408(a) supports the application approach because it fails to mention the certificate of registration, but we disagree. Section 408(a) states, "[T]he owner of copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708." *Id.* § 408(a). This section states only the conditions a copyright owner must satisfy to obtain registration. It does not speak to the timing of registration or the obligation

of the Register of Copyrights to examine and approve or refuse an application.

Section 410(d) also supports the registration approach, notwithstanding the argument of Fourth Estate to the contrary. That section states that "[t]he effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office." § 410(d). To be sure, section 410(d) relates registration back to the date that the owner files an application, but section 410(d) also makes evident that registration occurs only after the Register of Copyrights deems an application "to be acceptable." *Id.* Like other provisions of Title 17, section 410(d) establishes that registration occurs only after review and approval by the Register of Copyrights.

Fourth Estate argues that the three-year statute of limitations for infringement suits, *id.* § 507(b), supports the application approach, but we disagree. Considered together, the registration requirement and the three-year statute of limitations reflect a statutory plan to encourage registration. *See La Resolana*, 416 F.3d at 1199 ("Although Congress established a voluntary registration system, it created incentives for copyright owners to register their copyrights."). True, an owner who files an application late in the statute of limitations period risks losing the right to enforce his copyright in an infringement action because of the time needed to review an application. But this potential loss encourages an owner to register his copyright soon after he obtains the copyright and before infringement occurs. And section 507(b) is not the only provision of the Copyright

Act that favors prompt registration. *See* 17 U.S.C. § 410(c) ("[R]egistration *made before or within five years* after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." (emphasis added)). That is, far from undermining the registration approach, the three-year statute of limitations further evidences that the Copyright Act encourages registration.

Fourth Estate devotes its remaining statutory arguments to legislative history and policy, but "[w]hen," as here, "the words of a statute are unambiguous, then . . . judicial inquiry is complete." *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) (en banc) (internal quotation marks omitted) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L.Ed.2d 391 (1992)). Indeed, "[e]ven if a statute's legislative history evinces an intent contrary to its straightforward statutory command, we do not resort to legislative history to cloud a statutory text that is clear." *Id.* (internal quotation marks omitted) (quoting *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (en banc)).

Finally, this appeal is not akin to the "unusual circumstance" presented by *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), in which we "allowed injunctive relief to be sought prior to registration" where there was "infringement of a registered work, a continuing series of original works created with predictable regularity, and a substantial likelihood of future infringements." *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 865 n.6 (11th Cir. 2008) (citing *Pacific*, 744 F.2d at 1499 & n.17). As explained, Fourth Estate has not alleged

infringement of any registered work. And this appeal, unlike *Pacific*, does not involve the ongoing creation of original works, or potential future infringement of works not yet created.

IV. CONCLUSION

We **AFFIRM** the dismissal of the complaint filed by Fourth Estate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 16-60497-Civ-Scola

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Plaintiff,

v.

WALL-STREET.COM, LLC AND JERROLD D. BURBEN,
Defendants.

[Signed 03/23/2016
Entered 05/23/2016]

Order Granting Motion to Dismiss

Robert N. Scola, Jr., United States District Judge

The Defendants Wall-Street.com, LLC and Jerrold D. Burden ask the Court to dismiss the Plaintiff Fourth Estate Public Benefit Corp.'s Complaint for copyright infringement (Counts 1 and 2) and removal of copyright management information (Count 3). (See Compl., ECF No. 1.) The Defendants argue that the copyright infringement claims must be dismissed, because Fourth Estate's alleged copyrighted works have not been registered. (Mot. 2, ECF No. 9.) As to the remaining claim, the Defendants argue that Fourth Estate lacks standing. In its response, although Fourth Estate defended against dismissal

of its copyright infringement claim, it did not address the Defendants request to dismiss for lack of standing. (Resp., ECF No. 16.) After reviewing the motion, the record, and the relevant legal authorities and for the reasons explained more fully below, the Court **grants** the Motion to Dismiss (ECF No. 9).

A court considering a motion to dismiss, filed under Federal Rule of Civil Procedure 12(b)(6), must accept all of the complaint's allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Although a pleading need only contain a short and plain statement of the claim showing that the pleader is entitled to relief, a plaintiff must nevertheless articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court must dismiss a plaintiff's claims if she fails to nudge her "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

"To make out a prima facie case of copyright infringement, a plaintiff must show that (1) it owns a valid copyright in the [work] and (2) defendants copied protected elements from the [work]." *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1300 (11th Cir. 2008) (citations omitted). The Copyright Act provides that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." *Watson v. K2 Design Grp., Inc.*, No. 15-CIV-61020, 2015 WL 4720797, at *2-3 (S.D. Fla. Aug. 7, 2015) (Bloom, J.) (quoting 17 U.S.C. § 411(a)).

The Defendants argue that because Fourth Estate's alleged copyrighted works are not registered, Fourth Estate has not satisfied the precondition for bringing an infringement action under the Copyright Act. Fourth Estate counters that although its works were not registered, an application to register was pending at the time of the suit, which is sufficient to survive a motion to dismiss. (Resp. 2, ECF No. 16.)

Although registration is no longer a jurisdictional requirement, *see Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 (2010), it is nonetheless a procedural bar to infringement claims. *See Dowbenko v. Google Inc.*, 582 Fed. Appx. 801, 805 (11th Cir. 2014) ("The Supreme Court recently clarified that, although § 411(a)'s registration requirement is not jurisdictional, it nevertheless amounts to 'a precondition to filing a claim.'"); *see also Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1303-05 (11th Cir. 2012) (noting that if the work was not foreign, "registration was required prior to suit," and finding that work was not a foreign work exempt from the registration requirement). *See generally, Watson*, 2015 WL 4720797, at *2-3 (providing a comprehensive summary of the case law on this issue). As a result, because a plaintiff must first obtain registration for the work at issue prior to initiating suit, the Court must dismiss Fourth Estate's claims for copyright infringement.

As to the remaining claim for injunctive relief based on removal of copyright management information, Fourth Estate's response is silent as to Count 3 in its entirety—Fourth Estate offers no opposition to Defendants' claims that Fourth Estate lacks standing to obtain injunctive relief on behalf of a third-party. Accordingly, the Court holds that

Fourth Estate has abandoned Count 3. *Phan v. Accredited Home Lenders Holding Co.*, No. 309-CV-328-J-32TEM, 2010 WL 1268013, at *5 (M.D. Fla. Mar. 29, 2010) (citing *Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000)).

Accordingly, for the foregoing reasons, the Court **grants** without prejudice the Motion to Dismiss (ECF No. 9). The Court **denies** the Request for Oral Argument (ECF No. 17) and directs the Clerk to **close** the case.

Done and ordered, at Miami, Florida, on March 23, 2016.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Civil Action No. 16-60497-Civ-Scola

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Plaintiff,

v.

WALL-STREET.COM, LLC AND JERROLD D. BURBEN,
Defendants.

COMPLAINT FOR COPYRIGHT INFRINGEMENT

(INJUNCTIVE RELIEF DEMANDED)

Plaintiff, FOURTH ESTATE PUBLIC BENEFIT CORPORATION, by and through undersigned counsel, brings this Complaint against Defendants, WALL-STREET.COM, LLC and JERROLD D. BURDEN, for damages and injunctive relief, and in support thereof states as follows:

SUMMARY OF THE ACTION

1. Plaintiff FOURTH ESTATE PUBLIC BENEFIT CORPORATION ("Fourth Estate") is an independent news organization built for the public benefit on strong journalistic principles and designed to build a long-term, stable and sustainable economic relationship based on fair treatment and equity for all stakeholders of the journalism community. The mission of Fourth Estate is to contribute to a healthy

society by fostering, supporting and incubating a sustainable and vibrant free press. Fourth Estate equips individuals and communities with the news and information they need to make wise decisions.

2. In service to its mission, Fourth Estate produces high quality, timely, accurate and compelling journalism created by reporters working all over the world. Fourth Estate owns the copyright in the articles produced by its journalists. Fourth Estate licenses its content to AHN Feed Syndicate ("Feed Syndicate"), a global leader of cloud-based news and content solutions for the enterprise, pursuant to a non-exclusive license agreement under which Fourth Estate retains the copyrights to its content, as well as the rights to pursue infringements of its content and recover damages.

3. Fourth Estate brings this action for violations of Fourth Estate's exclusive rights under the Copyright Act, 17 U.S.C. § 106, to copy and distribute Fourth Estate's original copyrighted works of authorship in its news articles and content.

4. The Defendants own and operate an on-line news and advertising website at the URL www.Wall-Street.com. Defendants obtained Fourth Estate's copyrighted works from Feed Syndicate pursuant to a limited license. After that license expired, Defendants continued to copy and distribute Fourth Estate's copyrighted works in violation of Fourth Estate's exclusive rights under the Copyright Act without Fourth Estate's permission.

5. Defendants copied and distributed Fourth Estate's copyrighted works not only to earn advertising revenue from readers of those works, but also to advertise and market the sale of the domain and

website Wall-Street.com, which Defendants market and promote at www.wallstreetcloud.com.

6. Fourth Estate's works are protected by copyright but are not otherwise confidential, proprietary, or trade secrets.

JURISDICTION AND VENUE

7. This is an action arising under the Copyright Act, 17 U.S.C. § 501.

8. This Court has subject matter jurisdiction over these claims pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331, 1338(a), and 1367.

9. Defendants are subject to personal jurisdiction in Florida.

10. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) and 1400(a) because the events giving rise to the claims occurred in this district, Defendants engaged in infringement in this district, Defendants reside in this district, and Defendants are subject to personal jurisdiction in this district.

PARTIES

11. Plaintiff FOURTH ESTATE PUBLIC BENEFIT CORPORATION is a Delaware corporation authorized to do business in Florida.

12. Defendant WALL-STREET.COM, LLC ("Wall-Street"), is a Florida limited liability company with a principal address at 6301 NW 5th Way, Suite 1400, Ft. Lauderdale, FL 33309.

13. Defendant JERROLD D. BURDEN ("Burden") is an individual residing in Broward County, Florida. Burden is the owner and operator of Wall-Street and www.WallStreet.com.

THE COPYRIGHTED WORKS AT ISSUE

14. Fourth Estate owns the copyright in thousands of copyrighted articles, including hundreds of articles first published in the three months since the filing of Fourth Estate's applications to register these articles with the Register of Copyrights immediately prior to the filing of this case. Upon receipt of the registration certificate for these works, Fourth Estate will file this certificate with the court. Consistent with the Copyright Act and the regulations promulgated thereunder, when issued by the Register of Copyrights the registration certificate will be dated prior to the filing of this action.

15. A list of the copyrighted works at issue in this case that were infringed by Defendants is attached hereto as Exhibit 1.

16. At all relevant times Fourth Estate was the owner of the copyrighted works at issue in this case. Fourth Estate became the owner of the copyrighted works either by virtue of the fact that the works were works for hire and/or by written assignment from the original authors of said works.

INFRINGEMENT BY DEFENDANTS

17. Feed Syndicate licensed the works at issue in this action to Defendants pursuant to the Terms of Use attached hereto as Exhibit 2.

18. The Terms of Use provide that "Prior to account cancellation you must stop display of all Feed-Syndicate provided content and permanently take down, remove and/or delete all cached, saved, archived, stored or databased content or data."

19. Defendants canceled their account with Feed-Syndicate but failed to comply with the provisions of the Terms of Use. Specifically, Defendants continued to display Fourth Estate's copyrighted works and

failed to permanently take down, remove and/or delete all cached, saved, archived, stored or data-based Fourth Estate copyrighted works.

20. Fourth Estate and Feed Syndicate never gave Defendants permission or authority to copy or distribute the works at issue in this case after termination of their license.

21. The Fourth Estate copyrighted works contain copyright management information.

22. The Terms of Use provide that the Fourth Estate copyrighted works licensed by Feed Syndicate contain copyright management information that reads "(c) FeedSyndicate – All Rights Reserved. The writer or author byline, if included."

23. When Defendants copied and distributed Fourth Estate's copyrighted works they removed Fourth Estate's copyright management information.

24. Fourth Estate and Feed Syndicate never gave Defendants permission or authority to remove copyright management information from the works at issue in this case.

25. Plaintiff has engaged the undersigned attorneys and has agreed to pay them a reasonable fee.

COUNT I

COPYRIGHT INFRINGEMENT AGAINST ALL DEFENDANTS

26. Plaintiff Fourth Estate incorporates the allegations of paragraphs 1 through 25 of this complaint as if fully set forth herein.

27. Fourth Estate owns valid copyrights in the works at issue in this case.

28. Fourth Estate registered the works at issue in this case with the Register of Copyrights pursuant to 17 U.S.C. § 411(a).

29. Defendants copied and distributed the works at issue in this case and made derivatives of the works without Fourth Estate's authorization in violation of 17 U.S.C. § 501.

30. Defendants performed the acts alleged in furtherance of their business for profit and to promote the sale of Wall-Street.com.

31. Fourth Estate has been damaged.

32. The harm caused to Fourth Estate has been irreparable.

COUNT II

COPYRIGHT INFRINGEMENT AGAINST BURDEN

33. Plaintiff Fourth Estate incorporates the allegations of paragraphs 1 through 25 of this complaint as if fully set forth herein.

34. Fourth Estate owns valid copyrights in the works at issue in this case.

35. Fourth Estate's registered the works at issue in this case with the Register of Copyrights pursuant to 17 U.S.C. § 411(a).

36. Defendants copied and distributed the works at issue in this case and made derivatives of the works without Fourth Estate's authorization in violation of 17 U.S.C. § 501.

37. Burden profited from the infringement of the exclusive rights of Fourth Estate in the works at issue in this case under the Copyright Act while declining to exercise a right to stop it.

38. Fourth Estate has been damaged.

39. The harm caused to Fourth Estate has been irreparable.

COUNT III
REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION

40. Plaintiff Fourth Estate incorporates the allegations of paragraphs 1 through 25 of this complaint as if fully set forth herein.

41. The works at issue in this case contain copyright management information ("CMI").

42. Defendants knowingly and with the intent to enable or facilitate copyright infringement, removed CMI from the works at issue in this action in violation of 17 U.S.C. § 1202(b).

43. Defendants committed these acts knowing or having reasonable grounds to know that they will induce, enable, facilitate or conceal infringement of Fourth Estate's rights in the works at issue in this action protected under the Copyright Act.

44. Fourth Estate has been damaged.

45. The harm caused to Fourth Estate has been irreparable.

WHEREFORE, the Plaintiff Fourth Estate prays for judgment against the Defendants that:

a. Defendants and their officers, agents, servants, employees, affiliated entities, and all of those in active concert with them, be preliminarily and permanently enjoined from committing the acts alleged herein in violation of 17 U.S.C. §§ 501;

b. Defendants be required to pay Plaintiff its actual damages and Defendants' profits attributable to the infringement, or, at Plaintiff's election, statutory damages, as provided in 17 U.S.C. §§ 504.

c. Plaintiff be awarded its attorneys' fees and costs of suit under the applicable statutes sued upon; and

d. Plaintiff be awarded such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable.

DATED: March 11, 2016

Respectfully submitted,
/s/ Joel B. Rothman
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STATUTORY PROVISIONS INVOLVED

The Copyright Act (17 U.S.C.) provides in relevant part:

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

* * *

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

* * *

§ 408. Copyright registration in general

(a) Registration Permissive.—At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(b) Deposit for Copyright Registration.—Except as provided by subsection (c), the material deposited for registration shall include—

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under subsection (e) of section 407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

(c) Administrative Classification and Optional Deposit.—

(1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single

registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under the following conditions:

(A) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(B) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate renewal registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through separate copy-

right notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published; and

(D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

(d) Corrections and Amplifications.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) Published Edition of Previously Registered Work.—Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

(f) Preregistration of Works Being Prepared for Commercial Distribution.—

(1) Rulemaking.—Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to

establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

(2) Class of works.—The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

(3) Application for registration.—Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office—

(A) an application for registration of the work;

(B) a deposit; and

(C) the applicable fee.

(4) Effect of untimely application.—An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of—

(A) 3 months after the first publication of the work; or

(B) 1 month after the copyright owner has learned of the infringement.

§ 409. Application for copyright registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include—

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) in the case of a work made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered; and

(10) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

If an application is submitted for the renewed and extended term provided for in section 304(a)(3)(A) and an original term registration has not been made, the Register may request information with respect to the existence, ownership, or duration of the copyright for the original term.

§ 410. Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) In any judicial proceedings the certificate of a registration made before or within five years after

first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 411. Registration and civil infringement actions

(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not

deprive the court of jurisdiction to determine that issue.

(b)(1) A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless—

(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and

(B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.

(2) In any case in which inaccurate information described under paragraph (1) is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.

(3) Nothing in this subsection shall affect any rights, obligations, or requirements of a person related to information contained in a registration certificate, except for the institution of and remedies in infringement actions under this section and section 412.

(c) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 505 and section 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a

work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary

transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

August 7, 2017

Mr. Aaron M. Panner
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036-3209

Re: Fourth Estate Public Benefit Corporation
v. Wall-Street.com, LLC, et al.
Application No. 17A150

Dear Mr. Panner:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on August 7, 2017, extended the time to and including October 13, 2017.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by /s/ JACOB A. LEVITAN
Jacob A. Levitan
Case Analyst

[attached notification list omitted]